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No. 08-862

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

UNITE (UNION OF NEEDLETRADES, INDUSTRIAL & TEXTILE EMPLOYEES (AFL-CIO)),

Petitioner,

v.

ELIZABETH PICHLER, RUSSELL CHRISTIAN, SETH NYE, HOLLY MARSTON, KEVIN QUINN, JOSE SABASTRO, THOMAS RILEY, AMY RILEY, and RUSSELL DAUBERT, on behalf of themselves and those similarly situated,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF

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STATEMENT PURSUANT TO RULE 29.6

Petitioner's corporate disclosure statement was set forth at page *ii* of its Petition for a Writ of Certiorari, and there are no amendments to that statement.

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4–CA–34161, and 4–CA–34345
(Jan. 30, 2009). 1

INTRODUCTION

Plaintiffs contend that UNITE's petition for certiorari should be denied for five reasons. (Opposition at 6-7). Each of their arguments lacks merit:

(1) UNITE is not seeking a "union organizing" exception to the DPPA but rather an explication of the proper analysis for determining the liability of anyone who accesses MVR information with mixed motives;

(2) Having consistently disputed whether UNITE can be held liable when it was motivated to obtain MVR information both to organize Cintas employees and to obtain information for litigation against Cintas, UNITE did not waive the dual purpose issue;

(3) UNITE is not seeking an advisory opinion about the DPPA's permitted use for litigation because a predicate of UNITE's dual purpose argument is its motivation to obtain information for litigation against Cintas[1];

(4) The Third Circuit failed to apply the Court's fundamental principles of statutory

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1. That litigation included NLRB proceedings concerning Cintas' violation of Section 8(a) of the NLRA. *Cintas Corp. and UNITE HERE*, N.L.R.B., Cases 4–CA–34160, 4–CA–34161, and 4–CA–34345 (Jan. 30, 2009).

construction when it held that "knowingly" meant something different in the civil and criminal provisions of the DPPA, thus reading Section 2722(a) out of the act, and when it misconstrued the actual damages provision, disregarding its structure and failing to apply the common law meaning of "liquidated damages"; and

(5) This petition is not premature because the issues presented will not be further litigated on remand of the affirmed summary judgment for determination of the amounts of liquidated and punitive damages to be awarded to plaintiffs and over 1700 class members.

Certiorari should be granted because the proper interpretation of the questions presented by UNITE is central to the DPPA's enforcement and their resolution by this Court is needed as parties litigate the privacy claims created by the act.

ARGUMENT

A. THIS PETITION PROPERLY PRESENTS THIS COURT WITH THE OPPORTUNITY TO RESOLVE THE FUNDAMENTAL ISSUE REGARDING THE LIABILITY OF PERSONS WHO USE MVR INFORMATION FOR TWO PURPOSES.

The central issue in this litigation – raised in the district court, the Third Circuit, and this Court – is whether UNITE violated the DPPA by obtaining MVR information for two purposes, a permitted purpose (in anticipation of litigation) and a non-permitted purpose (union organizing). Throughout this litigation, plaintiffs have made two arguments for imposing liability on UNITE, both of which UNITE has contested. First, they argue that the presence of a non-permitted purpose violates the DPPA, making any permitted purpose motivating the same conduct irrelevant. Second, they argue that, even if UNITE's non-permitted purpose is not an automatic violation, UNITE had no permitted purpose because the DPPA's permitted litigation use was inapplicable.

Both lower courts found in favor of plaintiffs, but for different reasons. Whereas the district court based its holding on its finding that UNITE's purpose was not within the litigation exception (App.101a) ("the question of partially permissible uses is not pertinent because there was no permissible use"), the Third Circuit did not address the litigation exception because it found that a non-permissible purpose alone triggered liability (App.31a) ("Because UNITE obtained and used the confidential information for an impermissible purpose – union organizing – it does not matter what other permissible purpose UNITE may have had.").

Plaintiffs make three arguments that misconstrue this history and the applicable law.

1. UNITE Is Not Seeking a Union Organizing Exception to the DPPA.

The DPPA allows a person to obtain MVR information for a permitted use and imposes liability when MVR information is obtained for a non-permitted use, but it is silent concerning the liability of a person whose use of MVR information is motivated by both permitted and non-permitted purposes. UNITE is not seeking a declaration that union organizing is a fifteenth permitted use under the DPPA, but the answer to a fundamental question of statutory interpretation – when liability can be imposed when MVR information is obtained for two purposes, one permitted and one not.

The Third Circuit's holding has the effect of incorporating a union *exclusion* from the DPPA because it prevents a union from ever coming within the DPPA, given that its ultimate goal – union organizing – is itself enough to negate any other permitted purpose pursuant to the DPPA. Similarly, businesses could be precluded from accessing MVR information for permitted purposes because of their profit-maximizing motive.

Thus, the dual purpose question extends beyond unions and labor disputes. People often – perhaps even usually – have multiple purposes for taking a particular action. Rather than engrafting a "union exception" onto the DPPA, reversal of the Third Circuit's holding would provide needed guidance concerning the situation where MVR information is accessed for multiple reasons.

2. The "Mixed Motives" Argument Was Not Waived Because UNITE Has Consistently Argued That It Had Two Purposes for Obtaining the MVR Information.

Plaintiffs' second argument relating to the dual purpose issue is that UNITE waived the "'mixed motive' argument" set forth in the petition for certiorari because it did not "argue or brief, nor cite any of the cases it now cites, in either court below." (Opposition at 7).

This argument misconstrues the law of this Court. This Court has repeatedly recognized that it may consider arguments that were not raised in the courts below, provided that the issue presented was properly preserved. *See, e.g., Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) (allowing petitioner to raise an argument for the first time before this Court, stating "[o]ur traditional rule is that 'once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below.'") (citations omitted); *Yee v. City of Escondido*, 503 U.S. 519, 535 (1992) (distinguishing between claims, which can be waived, and arguments in support of the claims, which cannot, and noting: "[h]aving raised a taking claim in the state courts, therefore, petitioners could have formulated any argument they liked in support of that claim here.").

Here, there is no question that UNITE has preserved the *claim* that the Third Circuit misinterpreted the DPPA by finding that an actor with both permitted and non-permitted purposes

automatically violates the DPPA. Indeed, UNITE has contested the issue of the liability of an actor with two purposes in the district court, the Third Circuit, and in the Question Presented to this Court. (Petition at *i*). Therefore, whether UNITE made the "mixed motives" argument to the Third Circuit has no bearing on *this* Court's ability to consider it.

Because the Third Circuit's interpretation of this issue – that any non-permitted purpose, however slight, automatically requires a finding of liability – conflicts with this Court's interpretation of liability when a defendant acts with both a permissible and a non-permissible purpose set forth in the "mixed motives" cases, this Court should grant this petition.

Moreover, more than simply representing an argument on the merits, the "mixed motives" cases cited in UNITE's petition demonstrate the conflict between the Third Circuit's decision and this Court's prior decisions and therefore demonstrate why certiorari should be granted. *See* SUP. CT. R. 10(c). The "mixed motives" cases reflect this Court's interpretation of laws prohibiting certain actions based on the purpose for which they were done in situations where the defendant performed the action for both permitted and non-permitted purposes.

Plaintiffs' efforts to distinguish the "mixed motives" cases are unavailing. Plaintiffs argue that the "mixed motives" analysis is inapplicable to the DPPA because there is an "express causation requirement" in the "mixed motives" cases that is not present in the DPPA. However, both Title VII and the DPPA prohibit certain

actions (*e.g.*, terminating an employee or obtaining MVR information) if the actor's purpose for the action is prohibited by the statute, but do not prohibit the same actions if the actor's purpose is not prohibited. Because the cases interpreting Title VII demonstrate how this Court has addressed situations where an actor has both a permissible and a non-permissible purpose, the "mixed motives" cases are directly relevant here.

Further, plaintiffs wrongly contend that "UNITE *admitted* that its use of motor vehicle records was *primarily* for the impermissible purpose of union organizing." (Opposition at 11). Rather than citing to UNITE's alleged admission, plaintiffs cite to the lower courts' opinions, none of which engaged in the balancing test required by this Court's "mixed motives" precedents. The district court held that UNITE did not satisfy its improperly stringent interpretation of the litigation exception (App.106a-08a); and the Third Circuit held that any impermissible purpose, whether primary or secondary, provided a basis for imposing liability (App.31a). Both courts reached these conclusions based on UNITE's admission that it had two integrated purposes, but UNITE never admitted that organizing was its primary purpose. Applying this Court's "mixed motives" analysis to the DPPA would require a remand of this case for a determination – by a jury in light of UNITE's view of the record below – whether liability could be imposed in light of UNITE's mixed motives.

3. UNITE Is Not Seeking an Advisory Opinion on the Interpretation of the DPPA's Permitted Use for Litigation.

Plaintiffs' final argument relating to the dual purpose issue is that this Court's consideration of the litigation exception would amount to an advisory opinion. (Opposition at 12-13). It is difficult to conceive how this case could involve an advisory opinion as there is no question that a "case or controversy" exists concerning the interpretation of the litigation exception. The dual purpose question presumes that UNITE had a permitted purpose. UNITE has consistently maintained that its use was permitted because it was an "investigation in anticipation of litigation." 18 U.S.C. § 2721(b)(4) (App.212a). Indeed, this was the determinative issue in the district court's decision.

Moreover, plaintiffs' contention that this Court must "affirm or reverse based on the ground relied on below" (Opposition at 13) is belied by the numerous opinions in which this Court has affirmed "on grounds different from those provided by" the court below. *See Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 711 (1996); *see also Hercules, Inc. v. United States*, 516 U.S. 417, 422 (1996); *Bd. of Airport Comm'rs of City of Los Angeles v. Jews for Jesus, Inc.*, 482 U.S. 569, 572 (1987).

B. CERTIORARI SHOULD BE GRANTED BECAUSE THE THIRD CIRCUIT'S CONCLUSION THAT THE TERM "KNOWINGLY" MEANS SOMETHING DIFFERENT IN THE CRIMINAL AND CIVIL LIABILITY SECTIONS OF THE DPPA CONTRAVENES THIS COURT'S PRIOR DECISIONS.

The Third Circuit's holding that the term "knowingly" means something different in the civil and criminal provisions of the DPPA[2] raises important issues of statutory interpretation. *See Comm'r of Internal Revenue v. Lundy*, 516 U.S. 235, 250 (1996); *Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 479 (1992). Plaintiffs' defense of the holding demonstrates why this Court should grant certiorari. After criticizing UNITE's interpretation of "knowingly" in Section 2724(a) as requiring that "a defendant first read the statute and consult[] with an attorney in order to determine whether or not a use was 'permitted,'" plaintiffs argue that criminal liability is imposed not by Section 2722(a), but by Section 2723 which provides that "a person who knowingly violates this chapter shall be fined under this title." (Opposition at 18-20). There are three problems with this argument.

First, this Court's decision in *Liparota v. United States*, 471 U.S. 419 (1985), which the Third Circuit never addressed, supports UNITE's argument that the term "knowingly" in the DPPA requires an appreciation of wrongfulness. As this Court stated in *Liparota*, liability

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2. The court "[held] that Congress differentiated between a knowing acquisition, disclosure or use to establish civil liability, and any knowing violation to establish liability for a criminal fine." (App.36a).

for a person who knowingly uses food stamp coupons in any manner not authorized by the statute does not require that the defendant "had knowledge of specific regulations"; rather, it could be proved through circumstantial evidence that the defendant "knew that his conduct was unauthorized or illegal." *Id.* at 434.

Second, plaintiffs' own interpretation of the criminal provision leads to exactly the bizarre result that they attempt to attribute to UNITE's interpretation. To be criminally liable under plaintiffs' interpretation, a person must "knowingly violate this chapter." 18 U.S.C. § 2723. It is *this* interpretation of the DPPA, not UNITE's, that provides for liability only if the defendant had "first read the statute and consulted with an attorney in order to determine whether or not a use was 'permitted.'" Such an interpretation would run counter to the "well-established adage" cited by plaintiffs that "ignorance of the law is no excuse." (Opposition at 16, citing *Bryan v. United States*, 524 U.S. 184, 195 (1998)).

Finally, plaintiffs fail to account for Section 2722(a). Under plaintiffs' interpretation, Section 2723 provides for criminal liability and fines, while Section 2724 provides for civil liability and remedies (Opposition at 20); but they fail to address Section 2722(a). By reading Section 2722(a) out of the DPPA, plaintiffs demonstrate the error of their position.[3]

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3. Plaintiffs' contention that the interpretation of the knowingly requirement is a non-issue because of the district court's statement that the "knowing nature of UNITE's acts is established" (Opposition at 16) is without merit because UNITE's knowledge of the wrongfulness of its conduct is a disputed issue of material fact that a jury must resolve.

C. CERTIORARI SHOULD BE GRANTED BECAUSE THE THIRD CIRCUIT FAILED TO APPLY FUNDAMENTAL PRINCIPLES OF STATUTORY CONSTRUCTION IN INTERPRETING THE DPPA'S ACTUAL DAMAGES PROVISION.

The Third Circuit's failure to apply fundamental principles of statutory construction in interpreting the DPPA's remedies provisions led to its erroneous conclusion that a court may award the greater of actual damages *or* $2,500, even if the plaintiff has not adduced any evidence of actual damages. Plaintiffs' response defends the lower courts' interpretation of the remedies provision on grounds that do not withstand scrutiny.

First, plaintiffs argue that the meaning of the statute is changed by the dash that punctuates Section 2724(b). Clearly, the dash after "may award" merely introduces the list of remedies available under the DPPA.

Plaintiffs' contentions regarding the meaning of "liquidated damages" similarly miss the mark. As explained in UNITE's petition, Congress's inclusion of the term "liquidated damages" supports the interpretation that a plaintiff must demonstrate actual damages to recover any compensatory award because liquidated damages are not awarded at common law if no harm occurs, and Congress is presumed to have meant for a statutory term to be interpreted pursuant to its common-law meaning. (Pet. at 30-31). Plaintiffs do not dispute that the cases (and Restatement sections) cited by UNITE hold that where a plaintiff suffers no injury, the court cannot award liquidated damages.

Moreover, *Rex Trailer Co., Inc. v. United States*, 350 U.S. 148, 153-54 (1956) (Opposition at 23), supports UNITE's position because this Court specifically found it was "obvious that injury to the [plaintiff] resulted," even though the damages were "difficult or impossible to ascertain."

Finally, plaintiffs' contention that "the invasion of privacy is itself an injury, for which victims are entitled to be compensated, without regard to any physical or economic injury" is belied by this Court's decision in *Doe v. Chao*, 540 U.S. 614, 620 (2004), holding that a plaintiff with no actual damages could not recover a minimum damage award of $1,000 under the Privacy Act, 5 U.S.C. § 552a. Despite previously noting that "*dictum* does not constitute legal 'authority'" (Opposition at 14), plaintiffs rely on *dicta* from *Doe v. Chao* which they contend demonstrates why its holding is inapplicable precedent. However, the absence of "person entitled to recovery" in the DPPA does not mandate different interpretations of the DPPA and the Privacy Act. In fact, as discussed above, the reference to "liquidated damages" in the DPPA has the same functional effect as "person entitled to recovery" in the Privacy Act in that both preclude recovery when the statutory violation caused no harm or injury. Moreover, if there are "critical" differences between the Privacy Act and the DPPA which make the holding of *Doe v. Chao* somehow inapplicable to the DPPA, that is all the more reason to grant this petition.

D. THIS PETITION IS RIPE FOR SUPREME COURT REVIEW.

Plaintiffs' final contention is that review of this matter is premature because

> the judgment being appealed from totals only $22,500. Moreover, the liability to the entire class has not yet been determined, so it would be premature to grant certiorari based on concern over the size of an award that has not been made.

(Opposition at 30). However, the district court has certified a class of 1,758 to 2,005 persons. Absent this Court's intervention, each class member will likely receive at least $2,500 in liquidated damages and possibly more if any plaintiffs are awarded multiple liquidated damages awards. Furthermore, the National Right to Work Foundation is seeking access to roughly 12,000 names allegedly accessed by UNITE to advise them that their rights have been violated. *See Pichler v. UNITE*, No. 04-2841 (E.D. Pa. Apr. 15, 2008) (Dkt. 257), *appeal pending*, No. 08-2354 (3d Cir.). Should Right to Work prevail on its appeal, the amount at issue could reach $30,000,000 or more. Far from the $22,500 plaintiffs contend is at issue, this is exactly the "enormous potential liability, which turns on a question of federal statutory interpretation" that Justices Scalia and Alito noted "is a strong factor in deciding whether to grant certiorari" in considering another DPPA petition for certiorari. *Fid. Fed. Bank & Trust v. Kehoe*, 547 U.S. 1051 (2006).

Moreover, unlike the *Kehoe* petition, which was premature because the district court had not resolved whether there was a knowing violation, here both lower courts have addressed all the liability issues and the Third Circuit's remand is limited to a determination of whether multiple or punitive damages should be awarded. Thus, this petition presents the opportunity for this Court to address the issues that were premature in the *Kehoe* petition.

CONCLUSION

For the foregoing reasons, UNITE respectfully urges the Court to grant this petition for a writ of certiorari.

Respectfully submitted,

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